No. 16117

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEBASTOPOL APPLE GROWERS UNION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
OWSLEY VOSE,
MELVIN J. WELLES,
Attorneys,
National Labor Relations Board.

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(Sebastopol Apple Growers)

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JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against the respondent on August 27, 1957, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*),[1] herein called the Act. The Board's decision and order (R. 197–201) are reported in 118 N.L.R.B. 1181. This Court has jurisdiction under Section 10(e) of

[1] The relevant statutory provisions are reprinted in the Appendix, *infra*, pp. 43–45.

the Act, the unfair labor practices having occurred in Sebastopol, California, within this judicial circuit.[2]

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law [3]

In summary, the Board found, upon charges filed by General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL, herein called the Union, that respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their union sympathies, threatening reprisals against supporters of the Union, promising benefits to employees who refrained from union activity, and requiring applicants for employment to answer questions divulging their union affiliations. The Board also found that respondent violated Section 8(a)(3) and (1) of the Act in connection with the mass layoff of 143 employees and the discharge of 3 employees. The subsidiary facts on which these findings rest are summarized below:

A. Respondent's interference, restraint, and coercion

1. *Background; the Union's organizational campaign*

Late in July 1954 shortly after respondent's 1954 seasonal operations began, Angelo Bertolucci, president of the Union, and Ray Rhodes, its secretary-

[2] Respondent, a California cooperative corporation engaged in packing, canning, and shipping apples and apple products at its plant at Sebastopol, California, makes substantial interstate purchases and sales; no jurisdictional issue is presented (R. 17–18).

[3] The Board adopted the findings and conclusions of the Trial Examiner (R. 198).

treasurer, came to the plant and spoke with respondent's general manager, Elmo Martini (R. 19–20; 213–214; 295–296, 787–788). Rhodes told Martini that quite a few employees had signed union authorization cards, and he requested permission to talk to the employees (R. 20; 215–217, 299, 788). Martini refused permission, and told the Union representatives that they could do what they wanted off the premises (R. 10; 217, 299, 788). Martini agreed, in response to Rhodes' request, to bring the question up before a meeting of respondent's Board of Directors scheduled for that evening (R. 20; 217, 788–789). At this meeting after considerable discussion, Ezra Briggs, one of respondent's directors, suggested that Martini "contact Mr. Jack Rossi * * * an expert on matters of this type to find out what favorable action we could take to discourage the AFL from causing any disturbance among our employees" (R. 20–21, 871–875).

On August 17, 1954, a substantial number of the employees having signed Union authorization cards, the Union filed a petition with the Board requesting an election among respondent's employees. The hearing on this petition took place September 19 and subsequently the election was scheduled for October 19 (R. 36; 417).

A Union meeting was held on the night of October 13 at which Union buttons were distributed among the employees. The next morning a majority of the day shift employees wore the buttons at work (R. 55; 387–388, 455, 576–577, 601–602, 628–629, 649, 653–654).

2. Respondent's unlawful interrogation and threats

a. The activities of Superintendent Beavers

Shortly after respondent's Board of Directors' meeting in July at which the advent of the Union was discussed, respondent's superintendent, Darrel Beavers,[4] summoned employee Gloria Pate[5] to his office (R. 23; 698). Beavers told Pate that he wanted to talk to her about the Union's anticipated organizational drive (R. 13; 698–699). He indicated that Pate "was supposed to have had something to do with the Union at Marzana's" (where Pate had previously worked under Beavers' supervision), and "they asked me here if you had anything to do with the Union and I told them no; * * * because I don't want you to lose your job and I know you would lose your job if I had told them yes" (R. 23; 698–699). Beavers told Pate that she might be blackballed if she returned to Marzana because of her union connections there, and he advised Pate not to participate in any organizing activities, because it would "be bad on" him and Pate would be fired (R. 23–24; 699).

b. The activities of Plant Manager Martini

Pate and Lindsay were among the more active adherents of the Union and on the Union committee (R. 26–27; 664, 700–701, 706, 1257–1258).[6] Early in

[4] Beavers left respondent's employ several days after this incident; Leonard Duckworth succeeded him as plant superintendent (R. 13; 230, 249, 697).

[5] Pate testified as Gloria Lee de Font, her married name, but will be referred to herein by her maiden name (R. 26, 134; 697).

[6] In fact, these two and a third employee were reported to Superintendent Duckworth early in August by supervisor Edna Hardin as "agitators for the Union" (R. 26–27; 1166).

August, Plant Manager Martini stopped at the work station of Pate and Lindsay, and asked them what they thought about the Union (R. 27; 664–665, 669, 702–3). Both girls answered that it was "a pretty good deal" (*ibid.*). Martini then advised them that they did not know what they were getting into, that although they might get more money if the Union got in, they would have to pay out more in dues and initiation fees (R. 27–28; 664–665, 669, 702–3). Late in September, Martini gave Pate and Lindsay a newspaper clipping about certain financial irregularities of a sister local of the Union, and asked them, "Now, what do you think of the Union?" (R. 34; 668–669, 704–705). Martini subsequently warned them that "if the plant would go Union * * * he'd close it down, that he'd lose too much money if it went Union, that he'd closed his plant there in Santa Rosa on account of the Union"[7] (R. 29–31; 667–668, 705, 717).

On September 22, employees Lila Layman and Orice Storey were summoned to Martini's office (R. 37; 322–324, 348–350). Manager Martini talked at some length against the Union, advising Layman and Storey that they should think the matter over carefully before getting involved (R. 37–38; 348–350, 442–445). Martini then forbade Layman from talking about the Union on Company property (R. 38–39; 324, 349, 444).

About the first of October, Martini told a group of women employees, in response to a question by one

[7] Martini had been employed by R. Taylor Company in Santa Rosa from 1943 to 1952 (R. 30; 945). The plant was unionized, and it closed in 1952 (R. 30; 954–955).

of them as to why "he wouldn't go union," that "he would close the plant down rather than to see it go union, because he couldn't afford to pay union wages" (R. 34–35; 409–410, 412,413, 445–446).

In early October, Lindsay was working at other than her usual location, and Martini asked her what she was doing there. When Lindsay replied that she was there on relief, Martini said, "Well, what are you trying to do, change them over to the Union?" Lindsay denied this, and Martini said, "I bet you are campaigning for them * * * I ought to put you over with Mr. Storey, you two could have a ball" (R. 64; 670).

On October 15, as shown more fully hereinafter, respondent laid off more than half its employees (R. 68–72; 1120–1230, see pp. 15–18, *infra*). On October 19, the scheduled election took place[8] (R. 19, 56; 417, 1202–1203). Even after the election, Plant Manager Martini remained interested in the union persuasion of its employees. On the evening of the election Martini met Marie Tripp, who had been laid off on October 15, and sought to ascertain Tripp's attitude toward the Union by asking how the election returns suited her (R. 52–53; 656–657, 927–929).

Late in October, after the layoff and the election,

[8] The results of this election were inconclusive because of the large number of challenged ballots. The Union received 27 votes, 73 were against the Union, and 111 ballots challenged (R. 1202–1203). Although the representation case was consolidated with the instant proceeding for hearing, it is not in issue now, as the Board granted the joint request of respondent and the Union to withdraw the petition in the representation case (R. 198).

Lila Layman and Mary Russell came to the plant looking for work. Martini informed them that no jobs were then available and added, in substance, that they should have thought it over seriously before getting involved with the Union "deal" (R. 53–55; 414–416, 448–450).

c. The activities of Floorlady Herrerias

Ella Herrerias, the floorlady on the night shift (R. 31; 229–230) also openly campaigned against the Union. In late August or early September, Herrerias threatened a group of employees that any who signed Union pledge cards or "talked union" would immediately lose their jobs (R. 31–32; 407–409). She added that someone from the Company would be at Union meetings, that respondent would learn which employees attended, and that respondent would discharge them (R. 31; 409).

At about the same time, Herrerias cautioned employee Eva Lee, in the presence of a group of women employees who were discussing the Union, "Don't get my girls all excited about the Union because * * * if you do * * * you are going to get blackballed from every job around here" (R. 32; 394–395, 423, 432). Herrerias also threatened the group with layoffs if they did not stop talking about the Union (R. 32; 395–396, 409).

A few days later, early in September, Herrerias warned a group of employees in the women's rest room, "If you girls think I am tough now, wait; if the Union gets in, I'll show you how tough I can be" (R. 32–33; 397).

Early in October, Herrerias told Ernestine Hack and Erma Bate that she was making up a list, and promised that those who would "stick" with her would be assured of a job. Herrerias threatened that employees who did not abandon the Union would be "blackballed," and there would be "some weeding out done" (R. 41–42; 423, 432).

On another occasion in October, Herrerias commented to Hack and Bate that "if the place went union we'd close down" (R. 41; 422–423, 431).

3. Respondent's adoption of a new application form which requires applicants for employment to reveal their union affiliations

In 1954 and earlier years, respondent used a short, one-half page application blank (R. 115; 1297). Before the 1955 season began, it adopted a new form of application blank, covering both sides of a full-size sheet, and containing the following question: "25. To what Trade, Professional or other organizations are you a member: (Do not name any organization which would reveal your race, religion, color, or ancestral origin)" (R. 115–116; 1172, 1205–1206). The concluding paragraph of the blank was as follows: "I understand that, in the event of my employment by the Company, I shall be subject to dismissal if any of the information I have given in this application is false or if I have failed to give any material information herein requested" (R. 1206). The Board concluded that job applicants in the categories employed by respondent would normally interpret question 25 as requiring disclosure of their union affiliation, if any (R. 116–119).

Upon the basis of the conduct described in the foregoing paragraphs the Board concluded that respondent had interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

B. Respondent's illegal discrimination against employees

1. The discharge of Orice Storey on September 22

Storey, who had worked for respondent in the 1953 season, returned for the 1954 season on July 16 (R. 120; 333). A good worker, she began as an apple sorter, but was soon made a trimmer because of her speed at that work (R. 120; 1170–1171).

In early August, shortly after the Union instituted its organizing drive, Plant Superintendent Duckworth and Night Foreman Charles Williams approached Union President Bertolucci and another individual who were handing out Union authorization cards and literature on the highway at the exit from the parking lot (R. 25; 334–335, 552). As employee Clarence Storey, accompanied by his wife, Orice, and another employee, were leaving the parking lot in their car on this occasion, they stopped at the highway. As they did so Superintendent Duckworth handed Orice Storey two Union application cards and said "As you leave, hit that man with these" (R. 25–26, 335–336, 552. Williams, who accompanied Duckworth, turned to Clarence Storey and said, "Storey, do your country a good deed and run over that guy"; both Duckworth and Williams pointed to the Union representative (R. 25–26; 336, 552–553). Both Storeys ignored these suggestions, signed the

authorization cards, and mailed them to the Union (R. 120; 334–337, 551–552, 1258–1263).

Orice Storey became a member of the Union's day shift organizing committee (R. 120; 339, 1257–1258).[9] She passed out Union pledge cards at and near the plant in the ensuing weeks, during lunch time and before and after the day shift's hours (R. 120; 337–342). Storey invited supervisor Hardin, day-shift floorlady, to a Union meeting some time in August, but Hardin declined the invitation, saying she would like to come but that if she did there would be too much "yak, yak" (R. 120–121, 342–343, 1169–1170).

On September 22, Union representatives on the highway in a sound truck urged employees over the loud speaker to get a committee together and ask Martini if he would meet with the Union representatives to discuss a consent election (R. 36; 439–440, 344). Lila Layman, Orice Storey, and Mary Russell recruited several other employees and attempted to see Martini (R. 36–37; 440–441, 345). Floorlady Edna Hardin then asked the group of women, who were standing around, why they did not punch in, and they told her they were waiting to see Martini (*ibid*). Hardin then informed Martini that Orice Storey wanted to talk to him. Martini came down to the group of women standing about (between 25 and 75) and, when Storey and Layman asked him to meet with the Union representatives, he said he was unwilling to consent to an election (R. 37; 441–

[9] There were 22 other members of the day shift organizing committee, and 11 members of the night shift organizing committee (R. 103; 1257–1258).

442, 246, 347). The same afternoon, Martini summoned Layman and Storey to his office and, after cautioning them not to get involved with the Union, directed them to cease "talking union" on respondent's property (*supra,* p. 5).

Two days later, on Saturday, September 25, Orice Storey was discharged (R. 123–126; 238–241). Storey had been ill with a cold on Friday and Saturday, although she worked most of the time those two days (R. 122; 350–352, 1152–1154). About 11 a. m. on Saturday, less than an hour before the day shift ended, Storey informed Hardin that the aspirin she had been taking was not working, and obtained her permission to check out (R. 122; 352, 1154). After opening up the windows on her car, Storey walked back to the cannery to wait while her car cooled off (R. 122; 352–353, 1154). A number of night shift employees who were standing around waiting for their shift to start called Storey over and asked her about a Union meeting set for the following week (R. 122–123; 352–353, 1155). Chicano, one of the inspectors, went up to the balcony outside the superintendent's office and informed Duckworth that Storey "was all the time bothering her about joining" the Union (R. 124; 778–779). Duckworth, after consulting with Plant Manager Martini, went down to find out what Storey was doing and reported back that Storey was ill and had checked out (R. 123–124; 238, 243, 353–355). When Martini ascertained that Storey had actually punched out, he instructed Duckworth to ask her to leave (R. 124–125; 243, 317, 776–778). When Duckworth did so, Storey replied that it was hot outside and that

she was not bothering any one. Duckworth then informed Martini that Storey refused to leave (R. 24; 238, 242–244, 355, 777–782, 316–318). Martini thereupon directed Duckworth to see that Storey left and never came back (R. 124; 243, 317–318). Upon receiving these instructions, Storey went to her car and waited for her husband to complete his shift (R. 125; 355–357).

Martini and Duckworth then called Clarence Storey from his post. Martini, according to Storey, told him that his wife was "trying to form a committee on the night shift. I want you to fire her and get her out" (R. 125–127; 568–570).[10] Storey replied that if Martini wanted to fire her, that was for him to do (R. 125; 569–570). He added that his wife had punched out and was on her own time, and Martini responded, "I forbid talking union on cannery property * * * Why don't they get their — committees and get it over with. * * * You know I am the boss, I am the manager, I run this cannery. Why in the — don't you get Bertolucci and Rhodes to shut the — — place down" (R. 126; 570). Martini warned Storey that the next time he received a complaint about Storey leaving his post he would fire him also (R. 126; 243–244).

Later that day, employees Joanne Schwartz and Eloyce Mounger, while in respondent's office, saw

[10] Although Clarence Storey was a nonsupervisory employee, and therefore not in a position to discharge his wife, the Trial Examiner, upon conflicting evidence, credited Storey's testimony quoted above (R. 127). Apparently what Martini meant was that he wanted Storey to notify his wife that she was fired.

Martini rush in and heard him declare excitedly to one of the men in the office, "That damn Storey woman * * * she's always talking about the union * * * I am going to get rid of her * * * I'd rather see the place closed down than see it go union" (R. 132–133; 615–617, 729–732). About ten minutes later Schwartz asked Floorlady Hardin if Storey had been discharged and if so, why. Hardin replied that she had, and added that respondent could not "have that kind of people around that talk about the union all the time" (*ibid.*).

The following Monday, September 27,[11] Orice Storey came back to the plant with Majorie Byrd, and the two women and Clarence Storey went up to Martini (R. 127–128; 574–576, 599–601). Orice Storey asked Martini if she had been discharged, and Martini replied "Yes, Ma'am, you are fired and that's final" (R. 127–128; 360–361, 575–576). When Orice asked if her work had been satisfactory, Martini replied, "Yes, you were a good worker, but I cannot have you talking up this union thing and agitating among the other girls and forming committees. You are fired and that's final and your husband has your check." (*ibid.*)

Rejecting the contention that respondent had discharged Storey for gathering a group of women to talk in a dangerous location (discussed at p. 36, *infra*), the Board concluded that respondent had discharged her because of her Union activities, in violation of Section 8(a)(3) of the Act (R. 133).

[11] The Trial Examiner inadvertently stated that this incident occurred October 18 (R. 127).

2. The layoff of October 15

a. Respondent commences having the Co-op process apples at additional expense

On September 13 in the midst of the Union's organizing drive, respondent began shipping apples to another cannery, the Co-op, for processing (R. 78; 904–905, 1309–1311). Between September 13 and October 15 respondent shipped apples every other day or two to the Co-op, delivering 1,358 tons, in all, during this period (R. 78; 1298–1300, 1309–1311).[12] In all of 1953 it shipped only 155 tons of apples to the Co-op and it sent no apples to the Co-op in 1951 and 1952 (R. 1268).

About a week after respondent began shipping apples to the Co-op, employee Frank Unciano, not a Union member, asked Plant Superintendent Duckworth why respondent was sending apples to the Co-op. Duckworth answered that he was "trying to finish all the apples as fast as they could, because they were afraid the Union was going to get in * * *" (R. 87–88; 515–517). Duckworth added that "he don't want to do business with the unions, he don't want to sign or whatever happens * * *" (R. 88; 517).

Having the apples processed by the Co-op was more costly to respondent than canning the apples at its plant. It had to pay the Co-op $1.58 for every case of apple sauce canned. In addition, respondent

[12] Earlier that season respondent had shipped 74 tons of apples to the Co-op in order to have it process an order for small cans which it lacked the equipment to handle (R. 78, n. 35.)

had to pay the transportation charges involved in shipping the apples to the Co-op and delivering the finished products back to respondent's warehouses (R. 82–83; 1268).

b. Respondent accelerates its seasonal curtailment of operations, laying off a disproportionate number of Union members

On October 12, shortly before the election, respondent decided to reduce its operations by one shift. According to respondent this decision was due to the fact that its warehouses were filling up and the apples in prospect after October 15 could be handled by one shift (R. 68–79, 73; 1299). The selection of employees to be laid off was made by Superintendent Duckworth, Floorlady Herrerias, and Nightshift Foreman Williams after receiving lists of employees to be retained from other supervisors (R. 68–69; 762–766, 884–886). Ability and seniority were assertedly the determinative factors in selecting employees to be retained (R. 98; 765).

On October 15, respondent called its employees to a meeting [13] and announced that one shift would have to be laid off because of a shortage of warehouse space and that, insofar as possible, layoffs would be in order of seniority (R. 69–70; 388–392, 617–620, 708, 972–973, 1204). Paul Bondi, chairman of respondent's Board of Directors, informed the employees at this meeting that there was little space left in the warehouse, that

[13] The meeting was held at the end of the day shift, so that employees of both the day and night shifts could attend (R. 69).

not too many apples were left in cold storage, and that respondent was sorry that it had to lay off one shift (R. 70; 388–392, 654–655, 708, 963–964, 973). Recording secretary McGuire then announced that those who would not be working could turn their caps and aprons in and they would be paid for them (R. 70; 392, 618, 655, 1168). McGuire proceeded to read a list of those who were to be retained in respondent's employ and who were to report to work the following Monday, October 18 (R. 70; 389–390, 618, 655, 708; G. C. Exh. 36).

Before the layoff respondent had 253 employees, of whom 21 had been hired after October 2, the eligibility date for voting in the election. Excluding employees who could not vote in the election, respondent had 232 employees before the layoff (R. 110, 174–179; 1222–1230, 1238–1256). As a result of the layoff, respondent reduced its force of employees eligible to vote from 232 to 108 (R. 70, 104–110; 750–751, 1220–1221). Of the 124 eligible employees selected for layoff, 88, or over 70 percent, were Union supporters. Before the layoff, however, the Union had signed cards from only 107 out of the 232 employees, or a little over 40 percent (R. 105–113; 1258–1263).

The Union's greatest strength was among the women workers on the day shift. It represented 73 out of 86 or almost 85 percent of these women (R. 105–107; 1222–1228, 1258–1263). It was this group which was most affected in the 1954 layoff, 61 of these 86 women being laid off at this time (R. 109; 1220–1228). However, in the 1952 and 1953 layoffs only the night shift employees were affected, although

places for a few of the night shift workers were found on the day shift (R. 96–97; 385–386, 723–728).

Of the 21 new "ineligible" employees 15 had signed Union cards. After the layoff respondent retained in its employ six of these new employees, including five who had not signed Union cards (R. 105, 174–179; 1220–1230, 1258–1263). Twenty-two of the employees whose names were not on the retention list were either retained or rehired in the two-week period following the layoff (R. 111; 294–295, 1255–1256). Of these, while six had signed Union cards, the names of only three of them appeared on a list of Union members furnished respondent by Employee Erma Bate, on October 16, after the layoff, but before any rehiring was done (R. 111; 1209–1221, 1258–1263.[14] Among those rehired was Bate, who supplied respondent with the list of Union members (R. 139; 424–426). In addition to rehiring these employees, who were predominantly nonunion, within the next three weeks, respondent hired 13 employees who had never worked for it before (R. 114, 174–179; 294–295, 1256). Although Martini told a member of the laid-off employees to leave their names, addresses, and telephone numbers, so that respondent could call them if

[14] Erma Bate attended a Union meeting on October 13, and afterward took from the Union's desk a copy of a list of names and addresses of respondent's employees who had signed Union cards (R. 55–56; 419–420, 455–456, 1209–1219). She gave this list to Floorlady Herrerias on October 16 (R. 56–63; 420–421, 483–4, 455–456). Herrerias turned the list over to superintendent Duckworth, who kept it until October 19, the day of the election, and then returned it to Herrerias (R. 56; 457–459, 484–486).

a vacancy arose, they were not called (R. 114; 414–416, 448–450, 655–657).

c. Respondent has knowledge of the identity of Union sympathizers

As related above Herrerias stated, in effect, that respondent would have spies at union meetings. In addition the record shows that various employees reported to management on the activities of the leading Union supporters. As stated above, Chicano informed Superintendent Duckworth that Orice Storey "was all the time bothering her" about joining the Union (R. 124; 778–779). Employee Pauline Ploxa, early in October, discussed the Union activity with Floorlady Herrerias and commented that employee Mary Seidel was a trouble maker, who was "very strong union," and that Herrerias should be careful of her (R. 43–47, 49; 535–536, 1180–1181). The day before the Union meeting on October 13, Ploxa indicated that there was to be a Union meeting the next day, and suggested that Herrerias might be interested in the identity of employees attending (R. 50; 521–1182). On October 14, Herrerias asked Ploxa whom she had seen at the meeting, and Ploxa identified a number of employees (R. 50; 525). One of the employees identified by Ploxa was Clara Davello (R. 44–45, 51; 525). When Ploxa pointed her out to Herrerias, the latter said "Oh, I don't have to worry about her, she hates the Union" (*ibid.*). And as set forth above, employee Erma Bate gave Floorlady Herrerias a list of all the Union members on the day after the layoff.

The comments of respondent's supervisors to various Union adherents also reveal respondent's knowledge of the latters' Union sympathies. As discussed at p. 47, *supra,* Plant Manager Martini frequently spoke to employees, sometimes in a bantering manner, about their Union sympathies. These included employees Pate, Lindsay, Layman, Russell, and Orice and Clarence Storey. On one occasion, for example, he teased Layman and Russell about "going steady" with one of the Union organizers (R. 410–412, 446–447, see also 557–561, 664–667, 701–703). Finally, as stated above, a majority of the day shift employees wore their Union buttons in the plant on October 14, the day before the layoff.

d. The Board's conclusions concerning the October 15 layoff

On the foregoing facts the Board concluded that respondent had accelerated the layoff of one shift for the purpose of affecting the results of the pending election, and that it had selected employees to be laid off on a discriminatory basis, thereby violating Section 8(a) (3) and (1) of the Act (R. 97, 114, 170–171). In reaching this conclusion the Board rejected respondent's contentions that the layoffs were necessary (1) because respondent was running out of warehouse space, and (2) because the volume of apples in prospect was not sufficient to justify the retention of two shifts (see pp. 30–33, *infra*).

3. *The discharge of Gloria Pate on October 18*

Pate began working for respondent on July 15, 1954 (R. 134; 697). She was on the organizing committee

of the Union and was among the more active Union adherents (R. 26–27; 664, 700–701, 706, 1257–1258). As noted above, she was one of those reported by Floorlady Hardin to Superintendent Duckworth as being one of the "agitators for the Union" (R. 26–27; 1166).

Plant Manager Martini also was fully aware of Pate's Union sympathies. On various occasions he approached Pate at her work, asked her about the Union, raised questions as to what the Union could do for her, and suggested that the employees would have to pay out more in dues than the Union could gain for them (R. 27–28, 134; 664–667, 701–705). As stated above, on one occasion Martini threatened Pate that he would close down the plant "if we was to go union" (R. 26–27; 705). As noted also, Superintendent Beavers at the very beginning of Union drive had predicted that Pate would be discharged if she attempted to engage in organizational activities (R. 23; 698–699).

When, on October 15, respondent announced the layoff and read the list of employees to be retained, Pate's name was included (R. 134–135; 708, 1187, 1220–1221). She reported for work the following Monday, October 18, punched her time card, put on her apron and gloves, and started working, wearing several Union buttons (R. 135; 709–710). After about ten minutes, Foreman Williams asked Pate what she was doing there (*ibid.*). When Pate replied that she was working, Williams advised her that she was not supposed to be there (R. 135; 710–711, 888–889). Pate replied that her name was on the reten-

tion list, whereupon Williams, after checking with the office, informed Pate that he was sorry, but that her name was on the list by mistake and that she would have to leave (R. 135; 709–711). Pate stated that if she went home respondent would have to pay her for reporting to work, and Williams agreed to pay her for two hours work (R. 135–136; 710–711, 890). Respondent subsequently mailed Pate a check for two hours pay (R. 138; 714, 1295).

Before leaving the plant, Pate went to the office to ask Martini why she had been laid off (R. 136–137, 711–712). Martini replied that he did not know, as he had nothing to do with the list, and that respondent was laying off in accordance with seniority (R. 136–137; 712–713, 931–932). When Pate said that employees who had worked for 3 or 4 years had been laid off, Martini replied that only the current year counted (R. 137, 713). When Pate mentioned that she had come to work the first day that year, Martini's only comment was "I don't know, I just don't know" (*ibid.*)

Seven employees were rehired by respondent on October 18, the day Pate was discharged (R. 139–140; 426, 1255). One of these, Erma Bate, had delivered the purloined Union list to Herrerias (*supra,* p. 17). None of the seven had as much seniority as Pate, who began working July 15, 1954; the seven reemployed women began working on July 19 (Bate,), July 20 (Urton), August 9 (Wasin), September 12 (Caddell and Hofland), September 17 (Vessels), and October 4 (Jones) (R. 139–140, 174–179; 426, 1252–1255). And, as stated above, during the next three

weeks respondent hired 13 employees who had never worked for respondent (R. 114, 174–179; 294–295, 1256).

On these facts the Board concluded that in terminating Pate's employment respondent was motivated by a desire to rid itself of one of the more active and outstanding proponents of the Union, and that its conduct was violative of Section 8(a) (3) and (1) of the Act.

4. *The discharge of Dickerson on October 25*

Dickerson was employed by respondent in 1953, and returned to work for the 1954 season July 19 (R. 143; 625). She signed a Union pledge card August 4, attended Union meetings, and, like the others, wore her Union button on October 14 (R. 143; 626). She served as an observer for the Union at the October 19 election, a fact of which respondent was aware (R. 143–144, 154).

On October 25, while Dickerson was working on the trim line, there were very few apples in the flume and work was slack (R. 144; 633–635). She picked up an apple already peeled and cored, put two holes in the apple with her coring knife, placed a core in one of the holes, leaving about one inch protruding, and placed the apple back in the flume (*ibid.*). The apple was removed from the flume further down the line by Inspector Virginia Chicano, the employee who had reported Orice Storey's Union activities to Superintendent Duckworth just prior to Storey's discharge (R. 144; 1118–1119). At quitting time, Herrerias told Dickerson that she had to let her go be-

cause she had inserted the core in the apple and put it back in the flume (R. 145; 482). Dickerson told Herrerias that she had expected to be discharged because she had been picked as an observer for the Union in the election (R. 145; 629–630).

"Decorating" apples, and putting them and other foreign objects into the flume, was a laugh-provoking activity of long standing in the cannery (R. 155–158; 362–371, 382–385, 450–454, 577–583, 682, 688, 690–691, 1143, 1165). No employee had ever been reprimanded for such an occurrence (R. 155; 462, 642, 688, 1165). Respondent had four inspectors on the line whose duty it was to catch apples not suitable for sauce (R. 148; 678, 693). In addition, respondent had a "shaker screen" to remove any seeds and small particles remaining after the apples had been sliced (R. 158; 734–736, 939–943).

Respondent contended that on at least two occasions Dickerson had been observed putting plugged apples into the flume and that on the second occasion Superintendent Duckworth approved Floorlady Herrerias' recommendation that she be discharged (R. 149; 767). Duckworth defended his decision on the grounds that Dickerson had "sabotaged our product." Dickerson denied that she had plugged apples on more than one occasion (R. 145; 635–636, 639). Floorlady Herrerias admitted that Dickerson was given no warning against engaging in such conduct (R. 152, 157; 462).

Finding, in accordance with Dickerson's testimony, that she had plugged an apple on only one occasion, the Board rejected respondent's contention that she was discharged for repeatedly dropping decorated

apples in the flume, and concluded that Dickerson had been discharged because she was a prominent Union supporter (R. 159).

II. The Board's order

The Board's order requires respondent to cease and desist from engaging in anti-union discrimination, from requiring applicants for employment to answer questions concerning their union membership, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Act (R. 199). Affirmatively, the Board's order requires that the employees laid off or discharged be made whole for their losses as a result of respondent's discrimination against them, and that respondent post appropriate notices (R. 199–200).

ARGUMENT

I. Substantial evidence on the record as a whole supports the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act

A. Respondent's threats of reprisals, promises of benefits, and interrogation

As shown above (*supra,* pp. 4–9) respondent's supervisory officials engaged in numerous and widespread acts of interference, restraint, and coercion designed to interfere with the employees' rights under Section 7. This conduct included interrogating its employees concerning their union sympathies, threatening to close its plant if the Union succeeded in its attempt to become the employees' statutory bargaining representative, threatening employees with

discharge if they had anything to do with the Union, telling employees they would be blackballed if they supported the Union, threatening to "get tough" if the Union won the pending election, prohibiting certain employees from union discussion on respondent's property, and promising benefits to employees who refrained from union activity. That such conduct constitutes interference, restraint, and coercion in violation of Section 8(a)(1) of the Act is too well settled to require citation of authority.

Respondent's principal contention before the Board with respect to this, as well as to other phases of the case, was that the Trial Examiner erred in his resolution of the conflicting testimony. As this Court has said, "the oft-repeated rule [is] that questions of credibility are for the trial examiner who has the opportunity to observe the demeanor of the witnesses." *N.L.R.B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 906. It is manifest from the Trial Examiner's detailed resolutions of conflicts in testimony in the intermediate report that the Trial Examiner carefully considered the evidence in this case. The Board on its separate appraisal of the record having adopted the Trial Examiner's report, " 'a court may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo' " (*West Coast Casket* case, *supra,* 205 F. 2d at 907, quoting *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 488).

B. Respondent's use of a new employment application form requiring the disclosure of union membership

Beginning in the spring of 1955, respondent admittedly changed the form of its application blank. The new form, given to all applicants for rank and file jobs, contained the question "To what Trade, Professional or other organizations are you a member: (Do not name any organization which would reveal your race, religion, color, or ancestral origin)" (*supra,* pp. 8–9). In view of the concluding paragraph of the form which indicated that a failure to make a true or full disclosure of all the facts would subject an employee to discharge, the Board could reasonably find, as it did, that applicants for the kind of jobs respondent had to offer would interpret the form as requiring the disclosure of union affiliation (R. 116). This conclusion appears all the more sound in light of the fact that as the board noted (*ibid.*), applicants for jobs as apple peelers or apple dumpers were unlikely to have any "trade" or "professional" organizations other than labor organizations in which to report membership. In these circumstances, and bearing in mind the background of hostility to unions against which respondent's adoption of the new form must be viewed, we submit that the Board had ample warrant for its holding that respondent's use of the new application blank constituted interference, restraint, and coercion prohibited by Section 8(a)(1) of the Act.

While, as the Board recognized (R. 117), the use of an application form such as respondent adopted may not, standing alone, be *per se* interference, restraint or coercion (*N.L.R.B.* v. *Ozark Dam Constructors,* 190

F. 2d 222, 227 (C.A. 8); *Wayside Press, Inc.* v. *N.L.R.B.*, 206 F. 2d 862, 864 (C.A. 9)), the use of such forms in a context of intensive hostility to unions, such as has been demonstrated in this case, is a violation of the Act. In such circumstances, as the Court of Appeals for the Sixth Circuit has held, "the use of such forms is a type of interrogation which is no less violative of the Act than oral interrogation concerning union membership and activities; *Texarkana Bus Co. Inc.* v. *N.L.R.B.*, 8 Cir., 119 F. 2d 480 * * *." *N.L.R.B.* v. *F. H. McGraw & Co.*, 206 F. 2d 635 (C.A. 6). The Board's conclusion that the use of the new forms is violative of Section 8(a)(1) of the Act is consistent with this Court's decision in the *Wayside* case. There, the Court, in holding that the use of such forms, standing alone, did not constitute a violation of the Act, stressed the absence of any background of union hostility. Here, in marked contrast, respondent adopted the new forms after engaging in intensive antiunion activities and, indeed, for the very purpose of further effectuating its opposition to the Union.

II. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent accelerated its seasonal layoff and selected employees for inclusion therein for anti-union reasons, thereby violating Section 8(a) (3) and (1) of the Act

As shown above, *supra,* pp. 14–18, after having openly opposed the Union's organizing drive for over a month and threatened numerous employees with reprisal on account of the Union, including threats of discharge, blacklisting, and closing the plant, respondent suddenly commenced shipping apples to the Co-op for

processing. In the month preceding the Board election respondent shipped over 1300 tons of apples to the Co-op as contrasted with 155 tons in all of 1953. Plant Manager Martini explained to an employee (not a Union member) that respondent "was trying to finish the apples as fast as they could because they were afraid the Union was going to get in" (*supra,* 14).

On October 15, just four days before the election, respondent suddenly laid off over half of its employees with the explanation that respondent had insufficient apples to warrant the retention of two shifts. The Board found that respondent accelerated the seasonal layoff in order to defeat the Union in the election and that in selecting employees for layoff respondent was motivated by anti-union considerations. We submit that these findings are supported by the record and in accord with settled judicial authority.

Respondent's knowledge of the identity of Union supporters appears not only from Herrerias' statement that respondent would have spies at the Union meeting, but also from the many comments of Plant Manager Martini to various Union adherents concerning their Union activities (*supra,* pp. 4–7). In view of this knowledge, the disproportionate number of Union members selected for layoff, is persuasive evidence that respondent's actions were motivated by anti-union considerations. As stated above, of the 124 employees eligible to vote in the election who were laid off, 88, or over 70 percent, were Union support-

ers, whereas only a little over 40 percent of the employees as a whole had signed Union cards (*supra,* p. 16). Of the 21 ineligible employees, 15 had signed Union cards. Only one of these was retained as compared with 5 of the nonunion employees retained (*supra,* p. 17). The layoff bore most heavily on the day shift women, who were the most highly organized group among respondent's employees. Seventy-three of the 86 women on this shift (85 percent) were Union members. Sixty-one (70 percent) of the day shift women were included in the layoff. However, in previous years the day shift had scarcely been touched in the seasonal curtailment, the reductions-in-force on these occasions being confined to night shift employees (*supra,* p. 16–17).

Union members received the same disparate treatment in rehirings after the layoffs. Of the 22 employees whose names were not on the retention list but who were either retained or rehired shortly after the layoff, the names of only three appeared on the purloined list of Union members given respondent (*supra,* p. 17). And respondent also hired 13 new employees without recalling any of the other laid off employees, despite promises to do so (*supra,* p. 17).

The courts have uniformly held that "disproportionate treatment of union and non-union workers may be very persuasive evidence of discrimination * * * and may create an inference of discrimination leaving it to an employer to give an adequate explanation of the discharge or layoff * * *." *N.L.R.B.* v. *Chicago Steel Foundry Co.,* 142 F. 2d 306, 308

(C.A. 7); see also *N.L.R.B.* v. *Holtville Ice & Cold Storage Co.,* 148 F. 2d 168, 170 (C.A. 9); *North Whittier Heights Citrus Association* v. *N.L.R.B.,* 109 F. 2d 76, 78–79 (C.A. 9), certiorari denied, 310 U.S. 632; *N.L.R.B.* v. *Shedd-Brown Mfg. Co.,* 213 F. 2d 163, 174 (C.A. 7); *N.L.R.B.* v. *W. C. Nabors d/b/a W. C. Nabors Company,* 196 F. 2d 272, 275 (C.A. 5), certiorari denied, 344 U.S. 865; *N.L.R.B.* v. *Sifers Candy Co.,* 171 F. 2d 63, 66,(C.A. 10)

Respondent failed to substantiate its contention that ability and seniority were the determinative factors in selecting employees for layoff. Respondent had no production records and did not offer any evidence indicating that the ability of those retained was in fact superior to that of the employees laid off. As to seniority, the record shows that this factor was disregarded in many instances; viz, the hiring of persons who had never worked for respondent immediately after the layoff, and the retention of a number of employees who had been hired so late in the season that they were not eligible to vote in the representation election, as against the layoff of long service employees, such as Gloria Pate.

Respondent sought to explain the acceleration of the layoff on the grounds that the apples in prospect were insufficient to keep two shifts going and that the warehouse space for its finished products was becoming inadequate. Since the meager supply of apples on hand and in prospect was due entirely to the fact that respondent had been shipping apples to the Co-op for over a month, the basic question on this phase of the case is whether the Board was justified in finding

that respondent shipped the apples to the Co-op to enable it to get rid of Union supporters in advance of the election. In so finding, the Board rejected respondent's contention that the large quantity and poor quality of the apples on hand necessitated having them processed by the Co-op. Various considerations support the Board's findings in this regard.

The record does not bear out respondent's claim that spoilage amounted to 700 tons of apples. On the contrary, records produced at the hearing established that respondent succeeded in disposing of the entire 16,700 tons of fruit received during the 1954 season (R. 79, n. 36; 1305). By the time respondent commenced shipping apples to the Co-op respondent had had an opportunity to process most of the overflow from the peak of the Gravenstein season which had been reached two or three weeks earlier (R. 76–77, 82–91). Even if respondent had not entirely finished processing the Gravensteins by September 13, it would have at least finished them by the latter part of September according to the estimate of Winkler, vice chairman of respondent's Board of Directors (R. 77, 79–80, 90). But respondent contined to ship applies to the Co-op until October 14 (*supra,* p. 14). It even continued to send applies to the Co-op between October 12 and 15, after it decided that a curtailment of operations was going to be necessary (*supra,* p. 14).

The incurring of this additional expense, which could have been avoided simply by having its night shift work a few days longer, can rationally be explained only on the theory that respondent was determined to have a basis for effecting a reduction in

force before the election. As stated above, the election was scheduled for Tuesday, October 19. The layoff was effected on Friday, October 15. Had respondent deferred the layoff for as little as two working days longer, the layoff would have been postponed until after the election. In view of respondent's manifest hostility to the Union, the Board could reasonably infer, as it did, that respondent's real reason for incurring this unnecessary added expense was its determination to hasten the completion of the processing of the apples so as to be able to effect a substantial layoff of Union members before the election.

With regard to respondent's claim that a shortage of warehouse space also contributed to the layoff, respondent brought this situation on itself by its diversion of apples to the Co-op in pursuance of its illegal objective discussed above. Since respondent reasonably could have foreseen that processing the apples in three shifts (counting the apples handled by the Co-op as one shift) would result in a much more rapid accumulation of finished products, respondent cannot rely on the consequences of this action, taken in pursuance of its illegal objective, as justification for the accelerated layoff.

Furthermore, the record refutes respondent's claim of a shortage of warehouse space on October 15. Early in the 1954 season respondent completed and put into use a new, insulated warehouse with a capacity of 180,000 cases (R. 92; 842, 950). Respondent's old warehouse had a capacity of 114,000 cases (R. 91; 843, 1193). In addition to its old warehouse, respondent had previously used two

porches and a large cold storage room for storage purposes (R. 92; 949, 1195–1198). The latter, after being dried out with a heater, served as an insulated storage space for almost 140,000 cases (R. 92, 1196). The porches had a capacity of about 76,000 cases (R. 92; 1198). Thus, even without the new warehouse, respondent could store 330,000 cases of canned goods. Adding to this the capacity of the new warehouse, 180,000 cases, respondent could store 510,000 cases without shipping out a single case. Respondent's production for the 1954 season was approximately 495,000 cases (R. 93; 1264). Its carry over from the previous season amounted to about 40,000 cases more (R. 93, n. 44; 1267). However, by October 15 it had shipped out over 145,000 cases (R. 93; 1264). It is apparent from the foregoing that respondent had ample storage space on October 15, without using the porches at all. In view of the facts set forth above we submit that the Board was fully justified in rejecting respondent's contention that a lack of adequate storage space was one of the reasons for the acceleration of the seasonal layoff in 1954.

On the facts summarized above the Board was fully warranted in concluding that antiunion considerations motivated both the acceleration of the seasonal layoff and the selection of employees to be included in the layoff. As noted above, respondent's diversion of apples to the Co-op can be explained only on the basis that it enabled respondent to effect a substantial layoff of Union members in advance of the election. Respondent's entire conduct since the advent

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of the Union—its threats of reprisals against Union supporters and the discriminatory discharge of Orice Storey, the Union's most outspoken advocate—is consistent only with a determination to thwart the Union's organizing drive. The statement of Superintendent Duckworth to Employee Unciano that respondent was sending apples to the Co-op because it was "afraid the Union was going to get in" fully confirms the Board's conclusion that respondent's underlying objective in this maneuver was to defeat the Union in the election. Accordingly, the Board properly found that respondent's conduct in connection with the layoff was discriminatory and violative of section 8(a)(1) of the Act.

III. Substantial evidence on the record considered as a whole supports the Board's finding that respondent discriminatorily discharged Employees Storey, Pate, and Dickerson, in violation of Section 8(a) (3) and (1) of the Act

A. Orice Storey

As shown above (*supra,* pp. 9–10) Orice Storey had been employed by respondent for two seasons and was an excellent worker. Storey had been brought inside to be a trimmer because she was fast at sorting apples.

Storey was one of the most aggressive and outspoken of the Union adherents in respondent's plant, a fact well known to respondent's manager, Martini, and superintendent, Duckworth. As stated above, Storey had been the spokesman for the Union representatives when they sought to confer with respondent on September 22 about an agreement for a consent election. On this occasion Storey had been warned

about becoming involved with the Union, and instructed to cease talking about the Union on Company property.

Three days later, on September 25, Storey was abruptly discharged under circumstances which are indicative of respondent's true motivation. Feeling ill on this occasion, Storey had been excused from work, and had returned to the plant to wait while her car cooled off. She was engaged in a conversation about the Union by a group of employees waiting to go to work on the night shift, which commenced at noon on Saturdays. This was reported to the office by one of the Inspectors. Superintendent Duckworth requested her to leave but she protested that it was hot outside. Thereupon Duckworth consulted with Plant Manager Martini, who authorized her discharge forthwith. Immediately thereafter, Plant Manager Martini told Storey's husband she was trying to form a Union committee on the night shift, and that he wanted Storey to notify his wife that she was fired. On the very day of her discharge two employees, Mounger and Schwartz, overheard Martini say, "That damn Storey woman * * * she's always talking about the Union * * * I am going to get rid of her * * * I'd rather see the place closed down than see it go union." Two days later, Martini told Orice Storey and Majorie Byrd, in response to Storey's query whether she had been discharged, that he could not have her "talking up this union thing and agitating among the other girls and forming committees."

Respondent claimed at one point that Storey was discharged for calling together a group of women in the plant, and at another that she was discharged for gathering the group in a location that was dangerous because a fork lift was operating there. Respondent's actions on that occasion, however, belie its asserted reasons. In the first place, were the women in the group in any physical danger from the fork lift, Martini surely would have told the entire group to leave the area, yet only Storey was told to go. Second, if standing in a dangerous place had been the real reason for Storey's discharge, "it is extremely unlikely that * * * [Martini or Duckworth] would have suppressed it." *N.L.R.B.* v. *Smith Victory Corporation,* 190 F. 2d 56, 57 (C.A. 2). Even less convincing as an explanation for Storey's discharge is respondent's alleged rule against employees standing near the time clock before going to work on the night shift. The group of women were not there at Storey's behest, but were standing around when she approached. Further, it was not even suggested to any of the other women that they should not have been standing there. Finally, the evidence shows that if there was such a rule, it was never enforced, and that women normally stood around in that area while waiting to go on shift.

On the foregoing facts the Board was fully justified in rejecting respondent's explanation for the discharge and in concluding that Orice Storey was discharged because of her strong support of the Union.

B. Gloria Pate

As stated above (*supra,* pp. 19–20), Pate had signed a Union card on August 4, and she was on the Union's day shift committee. At the very beginning of the organizing drive Superintendent Beavers had warned that she would be discharged if she became involved with the Union and would be "blackballed" by other employers in the area. Manager Martini also was fully aware of Pate's prominence in the Union. Early in August, he had interrogated her about her union activities and sympathies. In September, shortly before her discharge, he had asked her to show a newspaper clipping reflecting adversely upon another local of the Union to Union officials and let him know what they had to say about it. Pate, like Orice Storey, had been reported to Superintendent Duckworth as a "union agitator."

Pate's name was on the retention list, and accordingly she reported for work the workday following the layoff. After 10 minutes she was told by Foreman Williams that she was not supposed to be there and would have to leave. Respondent later sent her a check for two hours pay for reporting to work that day.

Respondent defends its discharge of Pate on the ground that Pate's name was not on the retention list, and was, accordingly, not read at the October 15 meeting. However, Pate testified that she heard her name read; Mary Castino corroborated Pate, testifying that she too heard Pate's name read; and the

retention list furnished the General Counsel by respondent (R. 1220–1221) includes Pate's name. The Trial Examiner credited Pate and Castino as against respondent's witnesses, and concluded that the retention list earlier furnished the General Counsel by the respondent was more accurate than the one proffered by respondent at the hearing (R. 70–72).[15] That Pate would report for work the following Monday, if her name had not been read, is unlikely. Moreover, if respondent had not read Pate's name on October 15, it most likely would not have given her two hours' pay for reporting on October 18.

It is especially revealing that on October 18, and for the next few days, respondent was in need of employees. As detailed above, during that period it hired a number of new employees, and recalled seven employees who were junior to Pate, despite respondent's assertion that seniority was a factor in determining which employees to retain.[16]

These factors amply support the Board's conclusion that Pate was discharged by respondent because she was one "of the more active and outspoken proponents of the Union" (R. 143). It appears that

[15] The Trial Examiner based his finding that the list introduced into evidence by the General Counsel was more accurate than that introduced by respondent on the fact that the General Counsel's list more closely reflected what actually occurred. His reasoning appears at pp. 70–72 of the Record.

[16] Although respondent also claimed that ability was considered first, the number of new employees hired effectively rebuts any possible claim that Pate was discharged because more qualified employees were being retained. Nor did respondent adduce any evidence indicating that Pate's work had been poor, or even not as good, as any of the rehired employees.

respondent inadvertently included Pate's name on the retention list and acted promptly to remedy its oversight as soon as the error came to its attention. Under the circumstances, the Board validly concluded that respondent had discriminated against Pate in violation of Section 8(a) (3) and (1) of the Act.

C. Elsie Dickerson

As related above (*supra,* pp. 22), Elsie Dickerson's name was on the list of Union members taken By Erma Bate and turned over to Superintendent Duckworth after the October 15 layoff. She had acted as an observer for the Union in the election on October 19, a fact of which respondent was well aware.

On October 25, after having dropped a "decorated" apple in the flume, Dickerson was discharged. At the time of the discharge, Floorlady Herrerias informed her that she was being fired because she had been putting plugged apples in the flume. At the hearing, however, respondent took the position that she had "sabotaged" the product. The record clearly establishes that although instances of such "horseplay" were fairly common, respondent had never before taken a serious view of such conduct. The record is replete with instances of employees "fooling around" with apples coming along the flume; yet no employee was ever discharged, disciplined, or even warned, on account of such activity. Dickerson herself was discharged without warning, and for an alleged offense that was not only tolerated by respondent on all earlier occasions by other employees, but had been the

occasion of laughing and appreciative comments by supervisors in similar instances (R. 155–158; 362–371, 382–385, 450–454, 577–583, 682, 688, 690–691, 1143, 1165). Despite respondent's contention to the contrary, there was no real difference in substance between Dickerson's conduct and the decorating of apples which respondent had condoned in the past. While each new form of decorating an apple invented by a playful employee would differ from earlier attempts, there was little danger of seeds and particles of cores finding their way into the finished product. Respondent, as noted above, had inspectors whose function it was to remove foreign materials, and it had a screen to catch any small particles which escaped the notice of the four inspectors. Under all the circumstances it is difficult to believe that respondent actually thought that Dickerson was "sabotaging" the product.

Respondent's desire to rid itself of Union adherents has already been amply demonstrated. Beginning with the first attempt by the Union to organize its employees, respondent had countered by systematically threatening employees, interrogating them, lecturing them on the disadvantages of being unionized, and promising them benefits if they withdrew from the Union. On September 25, respondent discriminatorily discharged Orice Storey (*supra,* pp. 34–37). On October 15, respondent laid off more than half its employees in order to defeat the Union (*supra,* pp. 27–34). Respondent's antipathy toward the Union did not, of course, suddenly disappear after the layoff and the election. As the election was not conclusive, respondent was not yet, from its standpoint, in a secure

position. The disparity in the number of Union members retained on October 15 was repeated after October 18, as a grossly disproportionate number of the rehired employees were not Union members. These facts emphasize that respondent was still influenced by its Union animus after October 19.

Viewing the circumstances of Dickerson's discharge in light of respondent's well-established animus against the Union, the Board reasonably concluded that respondent seized upon the incident of "plugging" the apple on October 25 as a pretext for ridding itself of another employee thought by respondent to be one of the Union leaders. Accordingly, the Board validly concluded that Dickerson's discharge was discriminatory and violative of Section 8(a)(3) of the Act.[17]

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[17] After the hearing respondent and the charging Union apparently reached a mutually acceptable settlement of their differences, and jointly moved the Board to dismiss the proceeding. Under settled law the granting or denial of such a motion rests in the Board's discretion, for the Board acts as a public agency safeguarding the public interest and not to further the interest of a private litigant. Section 10(a), *infra*, pp. 43–44; *N.L.R.B.* v. *E. A. Laboratories*, 188 F. 2d 885, 887 (C.A. 2), certiorari denied, 342 U.S. 871; *N.L.R.B.* v. *Federal Engineering Co.*, 153 F. 2d 233, 234 (C.A. 6), and cases there cited.

The refusal of the Board to dismiss the instant case cannot prejudice respondent unless respondent has failed to remedy, or again commits, unfair labor practices. To the extent that respondent has already complied with the Board's order, respondent need not repeat its compliance, and to the extent that economic conditions render compliance impossible respondent will not be in contempt for failure to comply. However, to the extent, if any, that the settlement agreement leaves unremedied unfair labor practices as to which the Board's order provides a practicable remedy, the Board's insistence on its remedy, and its refusal to accept the private settlement, is manifestly in the public interest.

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

JEROME D. FENTON,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
OWSLEY VOSE,
MELVIN J. WELLES,
Attorneys,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

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